APPENDIX A

IN THE

United States District Court

E. D. VIRGINIA,
NORFOLK DIVISION

Civil Action No. 4095

SOLITE CORPORATION,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

May 16, 1966

WALTER E. HOFFMAN, Chief Judge.

On December 23, 1957, this Court rendered judgment in favor of Southern Lightweight Aggregates Corporation v. United States of America, Civil Action No. 2266, 58—1 U.S.T.C. para. 9235, 1 A.F.T.R. (2d) 392, in an action for the recovery of federal income taxes for the plaintiff's taxable years ending March 31, 1951, 1952 and 1953. The United States did not perfect any appeal from this decision. Shortly thereafter the name of the plaintiff was changed from Southern Lightweight Aggregates Corporation to Solite Corporation, but in all other respects the plaintiff's process of "mining" and "ordinary treatment process" remains the same. The

material facts and issues involved in the present litigation are essentially the same although the evidence herein presented is more extensive.

The instant proceeding is for the recovery of federal income taxes and interest thereon, in the aggregate sum of $31,979.70, for the fiscal year ended March 31, 1958. Presumably the decision will affect years subsequent to 1958.

Since the 1957 decision there have been several cases decided by the United States Supreme Court,[1] the Court of Appeals for the Fourth Circuit,[2] and more recently, the Court of Appeals for the Eighth Circuit,[3] which command a more searching examination of the facts and law. Prior to *Cannelton* (1960), it was universally held that taxpayers were entitled to treat as "ordinary treatment processes", for the purpose of determining their gross income for "mining" and, *a fortiori*, their percentage depletion deductions, all of the treatment processes normally applied by the taxpayers in order to obtain the first mineral product which could be "commercially marketable". The latter term, "commercially marketable", had been uniformly interpreted to mean an actual sufficient market existing therefor.[4] In-

1. United States v. Cannelton Sewer Pipe Co., 364 U.S. 76, 80 S.Ct. 1581, 4 L.Ed.2d 1581 (1960); Riddell v. Monolith Portland Cement Co., 371 U.S. 537, 83 S.Ct. 378, 9 L.Ed.2d 492 (1963).
2. Virginia Greenstone Company v. United States, 308 F.2d 669 (4 Cir., 1962).
3. United States v. Light Aggregates, Inc., 343 F.2d 429 (8 Cir., 1965).
4. United States v. Cherokee Brick and Tile Co., 218 F.2d 424 (5 Cir., 1955); Hitchcock Corp. v. Townsend, 232 F.2d 444 (4 Cir., 1956); United States v. Sapulpa Brick and Tile Corp., 239 F.2d 694 (10 Cir., 1956); United States v. Merry Brothers Brick and Tile Co., 242 F.2d 708 (5 Cir., 1957), cert. den. 355 U.S. 824, 78 S.Ct. 31, 2 L.Ed.2d 38; Dragon Cement Co. v. United States, 244 F.2d 513 (1 Cir., 1957), cert. den. 355 U.S. 833, 78 S.Ct. 50, 2 L.Ed.2d 45.

deed, two cases required "marketability at a profit".[5] Thus there was ample authority to support the 1957 decision of this Court in the action between the same parties but, of course, the prior conclusion cannot operate as an estoppel against the Government in the present case. As the Fourth Circuit pointed out in *Virginia Greenstone,* there is no need to be concerned with pre-*Cannelton* cases which may seem to point the other way.

Most of the essential facts have been the subject of a stipulation and, eliminating the formalities required as to filing a claim for refund, etc., we observe that the plaintiff-taxpayer, a Virginia corporation operating on a fiscal year basis ending March 31, is engaged in the business of extracting from the ground in Buckingham County, Virginia, a weathered material, commonly referred to as "weathered slate". The following steps are processes applied:

Step 1—The overburden, consisting of topsoil, on the surface of the ground is first removed.

Step 2—The weathered material lying below the top soil is then drilled and blasted and loaded on trucks, which carry said material to plaintiff's plant located approximately one-half mile from the quarry.

Step 3—The material is dumped from the trucks into the primary crusher and screener, where it is crushed and screened and then conveyed by a conveyor belt to a stock pile, from which it is conveyed by a conveyor belt and bucket elevator to a rotary kiln.

5. Commissioner v. Iowa Limestone Co., 269 F.2d 398 (8 Cir., 1959); Bookwalter v. Centropolis Crusher Co., 272 F.2d 391 (8 Cir., 1959).

Step 4—The material is fed into the high end of the rotary kiln (which is on an inclined axis) and, as the kiln turns, the material passes slowly from the higher end to the lower end of the kiln, from which heat is blown into the kiln.

Step 5—The material drops from the lower end of the kiln to the ground, where it stays long enough to become cool.

Step 6—The material is then placed, through the use of a clam shell bucket and crane, in the secondary crusher and screener, where it is crushed and screened and then loaded by a conveyor belt into freight cars.

It is conceded that no other substance or material of any kind is added during the above described treatment process. The rotary kiln is a "sintering process" which causes an agglomeration of the raw material by incipient fusion. The heat, approaching 2400°, causes the material to expand or bloat. In its final form taxpayer's product, sold under the tradename of "Solite", is used as a lightweight aggregate in making building units such as blocks.

Taxpayer contends that the finished lightweight aggregate as it emerges from the secondary crusher or, if not, then from the rotary kiln, is the first and only "commercially marketable mineral product" taken from its mining property, and that the rotary kiln process is an "ordinary treatment process" normally applied by mine owners to obtain the commercially marketable product. The Government urges that the cut-off point to "mining" is through the primary crusher stage of processing, i.e., at the end of Step 3. Because of the re-

cent decisions, especially the Eighth Circuit opinion in *Light Aggregates,* the Court agrees with the Government.

The pertinent statute involved is § 613 of the Internal Revenue Code of 1954 dealing with "Percentage Depletion". In substance it provides that in case of "mines and other natural deposits" the allowance for depreciation shall be the percentage of the gross income from the property.[6] The term "gross income from the property" is defined to mean "the gross income from mining". §613(c)(1). "Mining" is defined under §613(c)(2) as follows:

> "The term 'mining' includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills."

6. The percentage, as applied to the facts of this case and subject to the views expressed herein, is agreed to be 5% as the material when used by the mine owner was for use of "concrete aggregates, or for similar purposes." §613(b)(6).

Under § 613(c) (4) the term "ordinary treatment processes" is said to include—

> "(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment;
>
> "(D) in the case of lead, zinc * * *; [and]
>
> "(E) the pulverization of talc, the burning of magnesite, and the sintering and nodulizing of phosphate rock."

From the foregoing it appears that the pertinent inquiries are (1) was the process adopted by the taxpayer in subjecting the material to the heat of the rotary kiln an "ordinary treatment process", (2) if so, was it applied to obtain the "commercially marketable mineral product", and (3) does the "sintering" process so applied constitute a requisite mining process involving a mineral "customarily sold in the form of a crude mineral product" or for the purpose of bringing the material "to shipping grade and form, and loading for shipment".

We must discount taxpayer's contention that the "sintering process" affords any comfort to the position advanced by plaintiff. Clearly the evidence shows that the lightweight aggregate is no longer customarily sold as a "crude mineral product" after it emerges from the rotary kiln; nor is the "sintering" for the purpose of bringing the material "to shipping grade and form, and loading for shipment". While an analysis of the components of the raw material taken from the Brenio Bluff quarry and the clinker emanating from the kiln are sub-

stantially identical, the X ray diffraction demonstrates a marked or radical chemical change or, as sometimes described, a compound change.[7]

The record adequately supports the taxpayer's argument that there were no actual sales of the unprocessed material by the plaintiff-taxpayer to others. In that sense there was certainly no "available market" as the layman would interpret the words, until the product emerges from the kiln. There is some intimation that the unprocessed material might be used "if you did not have anything better", or it could conceivably be used on "unimportant roads" but could not be sold in any quantity. There is a suggestion that it might be used as a roofing granule in conjunction with other products, although this contention is seriously disputed. Manifestly, it is too soft and without sufficient strength to meet any minimum specification in road work. In short, unless used for processing in the final production of lightweight aggregate, it is universally discarded. It serves no utility in industry prior to its introduction into the rotary kiln.

The difficulty with this argument is that the Supreme Court has unequivocally held and established that actual sales are not a prerequisite to commercial marketability. In *Cannelton,* the Court said:

> "Ever since the first percentage depletion statute, the cut-off point where 'gross income from mining' stopped has been the same, i.e., where the ordinary miner shipped the product of his mine, * * * [a]s

7. A standard handbook entitled "Industrial Minerals and Rocks" classifies lightweight aggregate as a "crude mineral product", but the passage from this handbook likewise indicates that it is a "manufactured" lightweight aggregate. For this reason the reference material is of little assistance in solving the issues presented.

we see it, the miner-manufacturer is but selling to himself the crude mineral that he mines, insofar as the depletion allowance is concerned."

Later, in United States v. Longhorn Portland Cement Company, 328 F.2d 491 (5 Cir., 1964), the Fifth Circuit, after discussing the effect of *Cannelton* and *Riddell,* pointed out that the allowance for depletion was limited to "the constructive income received from such crushed limestone"; and that Congress intended to grant miners a depletion allowance on constructive income from the raw material produced, if marketable in that form, and not on the value of the finished product.

It is, of course, argued that the cut-off point should be where the mineral became commercially marketable but, under the teachings of *Cannelton, Longhorn Portland Cement,* and *Light Aggregates,* we find that the true test of the cut-off is *where the mineral first became suitable for industrial use or consumption,* and this is to be treated as though the miner sold the material to himself for processing.

We need not enter into an extended discussion of taxpayer's status as an integrated mining operator. In the testimony of A. G. Ford, Director of Sales, Southern Lightweight Aggregate Corporation (plaintiff's predecessor name), before the Senate Committee on Finance in 1951, repeated references are made to the "manufacture" of lightweight aggregate. We think that the taxpayer's status reaches the point of being an integrated miner-manufacturer when the material reaches the rotary kiln.

The case of United States v. Light Aggregates, Inc., supra, is on all fours with the factual situation here pre-

sented. It involves the same finished product although the components of the raw material may be somewhat different. The material has the same expanding or bloating propensity when subjected to high temperatures. When the material emerges from the rotary kiln, it resembles a "clinker" such as in the case under consideration. We find this Eighth Circuit opinion to be controlling in all respects and accordingly must dismiss the complaint herein.

A judgment order will be entered upon presentation and endorsement by counsel. No attempt has been made to compute the correctness of the tax collected and is only intended to determine the factual and legal issues governing the assessment of said tax.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 10,861

SOLITE CORPORATION,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK. WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued February 7, 1967. Decided March 30, 1967.)

Before HAYNSWORTH, Chief Judge, and J. SPENCER BELL and CRAVEN, Circuit Judges.

J. SPENCER BELL, Circuit Judge:

This is an appeal by the plaintiff taxpayer from an adverse judgment of the district court in a suit to recover alleged overpayments of federal income tax for 1958.

The taxpayer, a Virginia corporation, is engaged in the production of a lightweight aggregate used in the manufacture of building blocks and other building units. The lightweight aggregate, known by the trade name "Solite," is produced from a weathered material mined

by the taxpayer. The processes employed by the taxpayer, some of which are patented, were stipulated by the parties as follows:

"(a) The overburden, consisting of top soil on the surface of the ground, is first removed.

"(b) The weathered material lying below the top soil is then drilled and blasted and loaded on trucks, which carry said material to the plaintiff's plant located a short distance (approximately one-half mile) from the quarry.

"(c) The material is dumped from the trucks into the primary crusher and screener, where it is crushed and screened and then conveyed by a conveyor belt to a stock pile, from which it is conveyed by a conveyor belt and bucket elevator to a rotary kiln.

"(d) The material is fed into the high end of the rotary kiln (which is on an inclined axis) and as the kiln turns the material passes slowly from the higher end of the lower kiln, from which heat is blown into the kiln.

"(e) The material drops from the lower end of the kiln to the ground, where it stays long enough to become cool.

"(f) The material is then placed, through the use of a clam shell bucket and crane, in the secondary crusher and screener, where it is crushed and screened and then loaded by a conveyor belt into freight cars."

It was also stipulated that no other material of any kind is added during the processing and that the taxpayer

sells all of the processed material and does not use any of it in the manufacture of any other product.

The parties agree that the taxpayer is entitled to a five per cent depletion allowance under section 613 of the Internal Revenue Code of 1954.[1] The Government contends, however, that the taxpayer is entitled to a depletion allowance only on that portion of its gross income attributable to steps (a) through (c) of the processing set out above. The taxpayer, on the other hand, argues that it is entitled to a percentage depletion allowance on its entire gross income from the sale of the lightweight aggregate after all processing, or at least through step (d) (the kiln process). The district court held that only the gross income from the first three steps ((a) through (c)) of the processing could be considered in determining the amount of the taxpayer's depletion allowance, and we affirm.

The depletion allowance provided by section 613 is the allowable percentage "of the gross income from the property." 26 U.S.C.A. §613(a). The term, "gross income from the property," is defined in subsection 613(c)(1) as "the gross income from mining," and the term "mining" is defined in subsection 613(c)(2) as including "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products . . ."[2] The question for considera-

1. Because the instant proceeding is for the recovery of overpayments for the fiscal year which ended March 31, 1958, we are not concerned with the amendments to the statute which have become effective after that date.

2. The wording of 26 U.S.C.A. §613(c)(2) was substantially changed by a 1960 amendment.

tion on appeal is to what extent plaintiff taxpayer's processes are "ordinary treatment processes" within the meaning of the statute.

Subsection 613(c)(4) specifies certain processes which will be considered mining under the statute, and the taxpayer contends that its kiln process is specifically included in that subsection:

> "(4) *Ordinary treatment processes.*—The term "ordinary treatment processes" includes the following:
>
> . . .
>
> (C) in the case of . . . minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; . . . "

The district court found that the lightweight aggregate is not "customarily sold in the form of a crude mineral product" after the kiln process (established by the record to be a "sintering" process), and that the sintering is not for the purpose of bringing the material "to shipping grade and form." The district court's findings are adequately supported by the record and are not clearly erroneous.

The construction of "ordinary treatment processes normally applied . . . to obtain the commercially marketable mineral product or products" was recently considered by the United States Supreme Court in *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960). In that case the Court made it clear that percentage depletion cannot be used to give an advantage to the inte-

grated miner-manufacturer which is not shared by non-integrated miners and manufacturers. The taxpayer in the case at bar contends that it is not an integrated miner-manufacturer but a miner only, that it sells its product when it first becomes "commercially marketable," and that prior to the kiln process, the weathered material, which is a soft slate, is worthless. The district court found that there was no actual market for the taxpayer's mineral before the kiln process and that "unless used for processing in the final production of lightweight aggregate, it is universally discarded." The *Cannelton* case established that actual sales by the taxpayer are not required in order for a mineral to be classified as "commercially marketable." The Court in *Cannelton* also stressed that depletion is not allowed for processes designed to give a mineral worth "but for exhaustion of mineral assets alone." *Id.* at 88. The Court stated that if the mineral is worthless there can be no depletion: "One cannot deplete nothing." *Ibid.*

Neither is it determinative that the taxpayer is apparently the only producer in the United States of lightweight aggregate from this particular material, with the result that there are virtually no sales of the material anywhere before it is processed in a kiln, since the material has no use other than in the production of lightweight aggregates. In *Virginia Greenstone Co.* v. *United States,* 308 F.2d 669 (4 Cir. 1962), this court held that although the taxpayer in that case had a monopoly on greenstone, in that it controlled the only source of supply, it could not contend that the first "commercially marketable" product was its finished stones, since other dimension stone with which the taxpayer completed was in fact sold before the finishing process. The taxpayer in the

instant case does not have a monopoly of the supply of soft slate, but we do not think the existence of such a monopoly is essential to the principle established by the *Virginia Greenstone* case. The record in the case at bar indicates that there are manufacturers of lightweight aggregates processed from various other minerals which compete with the taxpayer's product, and some of them at least purchase the material used in their production rather than mine it themselves. If there are miners of materials used in the production of lightweight aggregates who sell that material before employing the kiln process, then surely miners who themselves employ the kiln process are miner-manufacturers within the meaning of the *Cannelton* case. It is obvious that the construction of the percentage depletion allowance statute contended for by the taxpayer would give it "a decided competitive advantage over its nonintegrated manufacturer competitor. Congress never intended that depletion create such a discriminatory situation. As we see it, the miner-manufacturer is but selling to himself the crude mineral that he mines, insofar as the depletion allowance is concerned." *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. at 87.

We do not interpret the cases as requiring that a market be actually available to the taxpayer in order for its mineral to be "commercially marketable" within the meaning of the statute. In *Riddell* v. *Monolith Portland Cement Co.*, 371 U.S. 537, 538 (1963), the Court pointed out that it had held in the *Cannelton* case that "the statutory percentage depletion allowance on the gross income of an integrated mining operator should be cut off at the point where the mineral first became suitable for industrial use or consumption." Since the material mined by

the taxpayer is physically susceptible of being transported, although transporting it over a considerable distance may not be economically feasible, and since others in the same industry purchase similar mateirals for use in the manufacture of a product substantially the same as the taxpayer's, we conclude that the mineral is "suitable for industrial use or consumption."

The taxpayer points out that in the *Cannelton* and *Monolith Portland Cement Co.* cases there was evidence of "substantial" markets for the minerals there involved. We do not think, however, that a finding of "substantial" sales of the material when it first becomes "suitable for industrial use or consumption" is an essential requirement of the result in those cases. The Eighth Circuit, in *United States* v. *Light Aggregates, Inc.,* 343 F.2d 429 (8 Cir. 1965), reached the same result even though only three per cent of the total national production of clays and shales, the minerals there in question, were sold by producers in their raw state, and none of those sales were in the taxpayer's state. In that case, as in the case at bar, the taxpayer, a producer of a lightweight aggregate, was attempting to compute its depletion allowance on the basis of the gross income from the sale of its lightweight aggregate after the kiln process. The court held that the kiln process was a manufacturing and not a mining process.

The judgment of the district court is

Affirmed.

APPENDIX C

§611. ALLOWANCE OF DEDUCTION FOR DEPLETION

(a) General rule.—In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. For purposes of this part, the term "mines" includes deposits of waste or residue, the extraction of ores or minerals from which is treated as mining under section 613 (c). In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this section for subsequent taxable years shall be based on such revised estimate.

(b) Special rules.—

(1) Leases.—In the case of a lease, the deduction under this section shall be equitably apportioned between the lessor and lessee.

(2) Life tenant and remainderman. — In the case of property held by one person for life with remainder to another person, the deduction under this section shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant.

(3) Property held in trust.—In the case of property held in trust, the deduction under this section shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

(4) Property held by estate.—In the case of an estate, the deduction under this section shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the income of the estate allocable to each.

(c) Cross reference.—

For other rules applicable to depreciation of improvements, see section 167.

§613. PERCENTAGE DEPLETION

(a) General rule.—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per cent of the taxpayer's taxable income from the property (computed without allowance for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) Percentage depletion rates.—The mines, wells,

and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) 27½ per cent—oil and gas wells.

(2) 23 per cent—

(A) sulfur and uranium; and

(B) if from deposits in the United States —anorthosite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos, bauxite, beryl, celestite, chromite, corundum, fluorspar, graphite, ilmenite, kyanite, mica, olivine, quartz crystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, nickel, platinum and platinum group metals, tantalum, thorium, tin, titanium, tungsten, vanadium, and zinc.

(3) 15 per cent—ball clay, bentonite, china clay, sagger clay, metal mines (if paragraph (2) (B) does not apply), rock asphalt, and vermiculite.

(4) 10 per cent—asbestos (if paragraph (2) (B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) 5 per cent—

(A) brick and tile clay, gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6); and

(B) if from brine wells—bromine, calcium chloride, and magnesium chloride.

(6) 15 per cent—all other minerals (including, but not limited to aplite, barite, borax, calcium carbonates, refractory and fire clay, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2) (B) does not apply) bauxite, beryl, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc, (including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 per cent for any such other mineral when used, or sold for use, by the mine owner or operator as riprap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

(A) soil, sod, dirt, turf, water, or mosses; or

(B) minerals from sea water, the air or similar inexhaustible sources.

(c) Definition of gross income from property.—For purposes of this section—

(1) Gross income from the property. — The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) Mining.—The term "mining" includes not merely the extraction of the ores or minerals from

the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills.

(3) Extraction of the ores or minerals from the ground.—The term "extraction of the ores or minerals from the ground" includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of such waste or residue or of the rights to extract ores or minerals therefrom.

(4) Ordinary treatment processes.—The term "ordinary treatment processes" includes the following:

(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

(B) in the case of sulfur recovered by the Frasch process — pumping to vats, cooling, breaking, and loading for shipment;

(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals

which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment;

(D) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product — crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores; and

(E) the pulverization of talc, the burning of magnesite, and the sintering and nodulizing of phosphate rock.

(d) Application of percentage depletion rates to certain taxable years ending in 1954.—

(1) General rule.—At the election of the taxpayer in respect of any property (within the meaning of the Internal Revenue Code of 1939), the percentage specified in subsection (b) in the case of any mine, well, or other natural deposit listed in such subsection shall apply to a taxable year ending after December 31, 1953, to which the Internal Revenue Code of 1939 applies.

(2) Method of computation. — The allowance for depletion, in respect of any property for which an election is made under paragraph (1) for any taxable year, shall be an amount equal to the sum of—

(A) that portion of a tentative allowance, computed under the Internal Revenue Code of 1939 without regard to paragraph (1) of this subsection, which the number of days in such taxable year before January 1, 1954, bears to the total number of days in such taxable year; plus

(B) that portion of a tentative allowance, computed under the Internal Revenue Code of 1939 (as modified solely by the application of paragraph (1) of this subsection), which the number of days in such taxable year after December 31, 1953, bears to the total number of days in such taxable year.